Increasing Transparency in the US Tax Court

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Increasing Transparency In The US Tax Court, 2018 Law360 338-149

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Summary

The U.S. Tax Court has made tremendous strides toward increased transparency in recent decades. Implementation of the docket inquiry system and searchable databases are a terrific start, but there's more to do, says Leandra Lederman of Indiana University Maurer School of Law.

Body

Transparency is a widely accepted judicial norm. It increases courts' accountability, and thereby increases the confidence and trust litigants and the general public have in courts' decision-making. Access to U.S. Tax Court documents has long differed from access to the documents of other courts.[1] The underlying cause is partly structural, in that the Tax Court isn't as neatly situated in the federal government's organizational chart as Article III courts, administrative agencies or even Article I courts such as the Court of Federal Claims. Accordingly, the Tax Court traditionally has created many of its own rules and procedures, such as ones governing access to its documents. This means that the issue is also partly cultural. As discussed below, access to Tax Court documents has increased over time as the court has evolved and further changes are in the works.
In the past, the Tax Court's more limited transparency has sometimes violated judicial norms and has sometimes created access inequities. For example, although the Tax Court generally is required by statute to make its reports and evidence "public records open to the inspection of the public,"[2] for years the Tax Court kept its summary opinions in small tax cases (also called S cases), confidential which I protested in 1998 in a short Tax Notes article called "Tax Court S Cases: Does the 'S' Stand For Secret?".[3] Although summary opinions lack precedential value, they are Tax Court opinions, revealing how the judge deciding the case - typically a special trial judge - thinks about the issues. The Tax Court's onetime practice of sharing those opinions only with the parties to the case meant that the Internal Revenue Service had a copy of every summary opinion, but taxpayers typically could not access the opinions in other S cases. This created an uneven playing field.

Secrecy can also lead to suspicion of favoritism or other inequities, concerns that existed in an analogous situation, in the era when the IRS did not make private letter rulings public but large firms collected them.[4] Litigation challenging this lack of transparency resulted in legislation,[5] requiring PLRs to be disclosed - with taxpayer information redacted.[6]

In the Tax Court context, at the time I wrote my 1998 article, the statute cited above already required public access to all Tax Court opinions and case files other than those subject to an exception "necessary to prevent the disclosure of trade secrets or other confidential information."[7] The Tax Court reportedly began making summary opinions and the underlying files publicly accessible shortly after that article was published.[8] That change ensured that interested parties can see both if similarly situated taxpayers are being treated similarly and if S case outcomes differ from those of regular cases, which was the issue I had wanted to study when I tried to obtain access to S cases before 1998.

Another example of a Tax Court violation of judicial norms was revealed by Ballard v. Commissioner, which went to the U.S. Supreme Court.[9] In the Ballard litigation, taxpayers' counsel was attempting to obtain the factfinding report of the judge who had presided over the trial in a consolidated multimillion-dollar fraud case. Although the decision the Tax Court had issued after trial said that it "agrees with and adopts" the special trial judge's report,[10] taxpayers' counsel had reason to believe that the result in the opinion - that the IRS had proven fraud by clear and convincing evidence - was not what the report had actually found.[11]

Such reports were being kept confidential following an internal rule change by the Tax Court in 1983. That rule change had also resulted in the report being excluded from the record on appeal.[12] So, no one outside the Tax Court could access the trial judge's report in those (large) Rule 183 cases.

In Ballard, the U.S. Supreme Court agreed with the taxpayer that the special trial judge's report could not be secret.[13] On remand, the Court of Appeals for the Eleventh Circuit ordered the Tax Court to disclose the original report.[14] That report had in fact found in favor of the taxpayer.
The Tax Court has made tremendous strides in the decades since I first argued for increased transparency. The Tax Court currently provides on its website a searchable database to locate opinions in its cases,[15] and summary opinions are available for decisions on or after Jan. 10, 2001. The Tax Court's TC and memorandum opinions are available there, too, and go back farther - to Sept. 25, 1995. More recently, the Tax Court made available a searchable database containing "all orders issued after June 17, 2011" except for "computer-generated mailings of form orders."[16] And the Tax Court does not charge for access to its online documents.

The Tax Court's online docket inquiry system[17] was another terrific addition. It allows searches by docket number, individual party name and corporate name keyword, and it goes back to the 1980s: The website states that "[d]ocket records are available for cases filed on or after May 1, 1986." It is also very helpful that the docket inquiry system now includes a link to the stipulated decision in a settled case. The Tax Court states that the docket inquiry system provides access to decisions and orders issued after March 1, 2008.[18]

Unfortunately, however, the docket inquiry system has some major limitations. First, for those not logged into the system as a representative, it currently allows access to only two cases in short succession. On searching for the third in a row, it says, "Access frequency exceeded. Please try again later."[19] This restriction presents obvious difficulties for researchers and journalists, among others. While an access-frequency limit may be intended to prevent denial-of-service and other cyber-attacks, the limit of two docket numbers seems unnecessarily low.

Second, the Tax Court’s current docket inquiry system does not provide electronic access to many types of documents. It does link both the decision and orders in the case, which is a very helpful feature. However, nonparty access to materials from the Tax Court public files, such as other documents listed there, calls for obtaining them from the Office of the Clerk of the Court in Washington, D.C. during business hours.[20] As Keith Fogg, director of the Federal Tax Clinic at Harvard's Legal Services Center, has pointed out, accessing hard copies is expensive unless you live in the Washington, D.C. area or have a friend there who is willing to do this kind of task for you.[21] Copies obtained from the Tax Court cost 50 cents per page,[22] which is another economic barrier to access.

The lack of electronic availability of many Tax Court documents not only limits the access of researchers, journalists and the general public, it restricts the access of attorneys who have not yet entered an appearance. It is not unusual for a taxpayer to petition the Tax Court pro se and seek counsel later, as Fogg has pointed out.[23] This is likely because the time within which to file a petition is short;[24] the "Last date to petition Tax Court" is required by an off-Code provision to be stated on the notice of deficiency,[25] the notice of deficiency does not say that there is also a refund option available[26] and the Tax Court helps facilitate filing with a simplified petition form that is available online.[27]

This limited electronic access to Tax Court filings contrasts starkly with Public Access to Court Electronic Records, or PACER, which is managed by the Administrative Office of U.S. Courts.[28] In the words of the PACER website,
"PACER hosts millions of case file documents and docket information for all district, bankruptcy, and appellate courts. These are available immediately after they have been electronically filed." PACER thus facilitates quick electronic access to numerous documents in a case file. PACER also has a fee schedule that is significantly below 50 cents per page:

Access to case information costs $0.10 per page. The cost to access a single document is capped at $3.00, the equivalent of 30 pages. The cap does not apply to name searches, reports that are not case-specific or transcripts of federal court proceedings. By Judicial Conference policy, if your usage does not exceed $15 in a quarter, fees are waived.[29] Of course, this means that PACER starts charging a user to access electronic documents after $15 worth in a three-month period - equivalent to 150 pages, assuming that no individual document reaches the $3 capped per-document fee. The Tax Court does not charge at all for electronic access, as noted above. However, as CPA Peter Reilly pointed out last year, "In PACER, almost all the docket entries will have a link like that [to documents in the case]. In the Tax Court most of them do not."[30]

It is worth remembering that the Tax Court provides a free, searchable database of its orders, as noted above. However, as Patrick Thomas, director of Notre Dame Law School's Tax Clinic, recently pointed out, although the Tax Court posts the day's "designated orders" each weekday after 3:30 p.m.,[31] "[t]he Order Search tool on the website does not distinguish between designated and undesignated orders."[32]

Complaints about the Tax Court's comparative lack of online access are longstanding.[33] The Tax Court has never been included in PACER or the oversight of the AOUSC.[34] In a 2008 article, I proposed to eliminate both of these omissions and align treatment of the Tax Court with that of the Court of Federal Claims.[35]

In a January 2008 press release, the Tax Court raised the privacy and security of taxpayer information as a concern that poses a potential barrier to increased electronic access.[36] That is an important issue worth serious consideration. Providing online access certainly increases the potential exposure for a document.

The Tax Court also has an undated notice on its website that, in part, "encourage[s parties] to refrain from including or to take appropriate steps to redact" private information, such as social security numbers.[37] PACER has had to address this issue, too, of course. Its website states "Certain personal identifiers are removed or redacted before the record becomes public, including social security number, financial account numbers, the name of a minor, date of birth, and home addresses in a criminal case."[38]

Technology has of course advanced in the decade since that press release, too. And on Oct. 30, the Tax Court announced that, on Sept. 28, 2018, it had "awarded a task order under the General Services Administration Information Technology Schedule 70 to Flexion, Inc. for software development services for an electronic filing-case management system."[39] Paul Merrion has reported that the new system will provide "[t]he first-ever public Internet access to U.S. Tax Court briefs," among other documents, and that the target date for the new system is Sept. 30, 2019.[40] He further states that he looked at the "user stories" included in the request for quotation and notes that they include,
As a Member of the Public, I need to search case records, so I can keep abreast of Tax Court cases. The new case-management system sounds like it will be another very important step in the right direction. However, this alone will not align the Tax Court with the transparency practices of other federal courts.

The Tax Court currently does not publish case statistics on its website,[41] although such aggregate statistics do not raise concerns about personal information. The Tax Court’s opacity in this regard contrasts with the AOUSC and the Court of Federal Claims, both of which make statistical documents available on their websites from drop down menus.[42]

Tax Court statistics can be valuable to litigants and researchers interested in trends over time and differences in results in pro se and other cases, as well as in regular and S cases. The Tax Court has produced detailed statistical documents at times, but there does not seem to be a regularized system for doing so, or for accessing them.[43] Including the Tax Court in the AOUSC, as I proposed in 2008, would solve this problem. Failing that, a statistical reports page analogous to that of the Court of Federal Claims,[44] would be a terrific addition to the Tax Court’s website. Perhaps this will be the next step in the court’s evolution!

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This essay is adapted from a post the author published on the Surly Subgroup blog.

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[6] I.R.C. § 6110(a) (I.R.C. § 6110(a)), (c) (I.R.C. § 6110(c)).
[7] I.R.C. § 7461(b) (I.R.C. § 7461(b)).


[24] See I.R.C. § 6213(a) (I.R.C. § 6213(a)) (providing a filing period of "90 days, or 150 days if the notice is addressed to a person outside the United States").


[27] https://www.ustaxcourt.gov/forms/Petition_Kit.pdf.


[35] Id. at 1241-46.


[38] https://www.pacer.gov/ ("Is All Case Information Available To The Public?" expandable section).


[40] Paul Merrion, Tax Court's New System To Expand Public Electronic Access To Filings, MLex US Tax Watch (Nov. 6, 2018).


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